

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

7 THE UNITED STATES OF AMERICA for) 2:09-cv-02087-ECR-PAL
the use and benefit of HAJOCA)
8 CORPORATION, a Maine corporation)
d.b.a. Kelly's Pipe & Supply and)
9 d.b.a. Kennan Supply,)
10 Plaintiff,)
11 vs.)
12 ASSOCIATED MECHANICAL, INC., a)
Nevada corporation; AMERIND)
13 BUILDERS, LLC, an Arizona)
corporation; E. C. SCARBOROUGH, an)
14 individual surety,)
15 Defendants.)
16)

17 This case involves a supplier to a public project alleging
18 breach of contract, unjust enrichment, and claims on a payment bond
19 for materials supplied and not paid-for in full. Now pending are a
20 motion for summary judgment (#25) filed by Plaintiff and a cross-
21 motion for summary judgment (#29) filed by Defendants Amerind
22 Builders, LLC ("Amerind") and E. C. Scarborough ("Scarborough").

The motions are ripe, and we now rule on them.

I. Factual and Procedural Background

27 Plaintiff Hajoca Corporation d.b.a. Kelly's Pipe & Supply and
28 d.b.a. Keenan Supply ("Hajoca") is a Maine corporation doing

1 business in Clark County, Nevada, selling plumbing goods and
2 materials. (Am. Compl. ¶ 4 (#10).) Defendant Amerind Builders, LLC
3 ("Amerind") is an Arizona corporation doing business in Clark
4 County, Nevada as a licensed contractor and the prime contractor on
5 the project known as Bldg. B718 and Bldg. B707/Contract No. FA4861-
6 07-C-A027 located on Creech Air Force Base in Indiana Springs,
7 Nevada ("the Project"). (Id. ¶ 5.) Defendant Associated
8 Mechanical, Inc. ("Associated") is a Nevada corporation doing
9 business in Clark County, Nevada as a licensed contractor and as a
10 subcontractor to Amerind on the Project. (Id. ¶ 6.) Defendant E.
11 C. Scarborough ("Scarborough") is an individual residing in Florida
12 and conducting business in Clark County, Nevada as an individual
13 surety at all times material to this case. (Id. ¶ 7.)

14 On or about September 30, 2007, the United States Air Force
15 awarded a contract to Amerind to provide materials, labor, equipment
16 and other work required to provide repairs and upgrades to buildings
17 at Creech Air Force Base, herein known as "the Project". (Ds' Opp.
18 to Mot. for Summary Judgment at 2 (#28).) Amerind subcontracted
19 part of the work to Associated. (Id.)

20 On or about November 14, 2007, Scarborough, in exchange for a
21 bond fee, issued payment and performance bonds for and in support of
22 the government contract for the Project. (Id.) The only bond at
23 issue here is the payment bond number AMERINDPP1114007 ("the Bond").
24 The total penal sum of both bonds was \$1,028,422.00 and Scarborough
25 pledged assets in the total amount of \$1,028,422.00 by means of a
26 Certificate of Pledged Assets ("Certificate"). (Id.) The
27 Certificate was incorporated into the Bond and stated an effective

1 date of November 14, 2007, until either completion of the Project or
2 twelve (12) months, whichever occurred first. (Id.) No request to
3 extend the Bond or Certificate was made. (Id. at 3.) The Project
4 is still open and ongoing. (Id. at 9.)

5 On November 1, 2000, and again on January 27, 2009, Associated
6 entered into a contract with Hajoca, wherein it was agreed that
7 Associated would pay for materials provided by Hajoca for various
8 projects. (P's Mot. for Summary Judgment at 2 (#25); Exhibit 1, P's
9 Mot. for Summary Judgment (#25-1).) On January 21, 2009, Amerind,
10 Associated, and Hajoca entered into a joint-check agreement wherein
11 Amerind would issue joint checks to Associated and Hajoca. (Exhibit
12 9, P's Mot. for Summary Judgment (#25-3).)

13 On February 3 and 6, 2009, Hajoca sent preliminary notices to
14 Amerind on behalf of Kelly's and Keenan, respectively. (Exhibit 4,
15 P's Mot. for Summary Judgment (#25-1).) Between January 30, 2009
16 and February 16, 2009, Hajoca caused plumbing materials to be
17 delivered to the Creech Air Force Base in Nevada for the Project.
18 (Exhibits 5 and 6, P's Mot. for Summary Judgment (#25-2).) Between
19 January 30, 2009 and February 16, 2009, Hajoca invoiced Associated
20 \$28,673.68 for the plumbing materials delivered, \$25,363.80 as to
21 Keenan and \$3,309.88 as to Kelly's, for which \$13,807.39 has been
22 paid by Scarborough, of which \$13,004.60 went to Keenan and \$802.78
23 to Kelly's, leaving a balance of \$14,866.29. (P's Mot. for Summary
24 Judgment at 3 (#25), Exhibit 6, P's Mot. for Summary Judgment (#25-
25 2).)

26 On May 12, 2009, Hajoca sent its 90-day notice of nonpayment
27 for the \$14,866.29 past due and owing to Amerind and Scarborough.

1 (Exhibit 7, P's Mot. for Summary Judgment (#25-3.)) Hajoca has not
 2 been paid the remaining balance on the invoices. (P's Mot. for
 3 Summary Judgment at 3 (#25).)

4 On October 29, 2009, Hajoca filed its original complaint (#1)
 5 in this court. On November 13, 2009, Hajoca filed an amended
 6 complaint (#10), alleging (1) breach of contract against Associated,
 7 (2) a payment bond claim against all defendants, (3) a cause of
 8 action for materials furnished against Associated, (4) a cause of
 9 action on account stated against Associated, and (5) an unjust
 10 enrichment claim against Associated and Amerind. On December 14,
 11 2009, Amerind and Scarborough filed their answer (#13) to the
 12 amended complaint (#10). On December 21, 2009, Hajoca filed a
 13 motion for default (#14) against Associated. On December 22, 2009,
 14 the Clerk entered a default (#15) against Associated.

15 On June 7, 2010, Hajoca filed a motion for summary judgment
 16 (#25) against Amerind and Scarborough for Hajoca's second and fifth
 17 causes of action. Amerind and Scarborough opposed (#28), and Hajoca
 18 replied (#30). Amerind and Scarborough filed a cross-motion for
 19 summary judgment (#29), Hajoca opposed (#31), and Amerind and
 20 Scarborough replied (#32).

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22 **II. Summary Judgment Standard**

23 Summary judgment allows courts to avoid unnecessary trials
 24 where no material factual dispute exists. N.W. Motorcycle Ass'n v.
 25 U.S. Dep't of Agric., 18 F.3d 1468, 1471 (9th Cir. 1994). The court
 26 must view the evidence and the inferences arising therefrom in the
 27 light most favorable to the nonmoving party, Bagdadi v. Nazar, 84

1 F.3d 1194, 1197 (9th Cir. 1996), and should award summary judgment
2 where no genuine issues of material fact remain in dispute and the
3 moving party is entitled to judgment as a matter of law. FED. R.
4 Civ. P. 56(c). Judgment as a matter of law is appropriate where
5 there is no legally sufficient evidentiary basis for a reasonable
6 jury to find for the nonmoving party. FED. R. Civ. P. 50(a). Where
7 reasonable minds could differ on the material facts at issue,
8 however, summary judgment should not be granted. Warren v. City of
9 Carlsbad, 58 F.3d 439, 441 (9th Cir. 1995), cert. denied, 116 S.Ct.
10 1261 (1996).

11 The moving party bears the burden of informing the court of the
12 basis for its motion, together with evidence demonstrating the
13 absence of any genuine issue of material fact. Celotex Corp. v.
14 Catrett, 477 U.S. 317, 323 (1986). Once the moving party has met
15 its burden, the party opposing the motion may not rest upon mere
16 allegations or denials in the pleadings, but must set forth specific
17 facts showing that there exists a genuine issue for trial. Anderson
18 v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986). Although the
19 parties may submit evidence in an inadmissible form – namely,
20 depositions, admissions, interrogatory answers, and affidavits –
21 only evidence which might be admissible at trial may be considered
22 by a trial court in ruling on a motion for summary judgment. FED.
23 R. Civ. P. 56(c); Beyene v. Coleman Sec. Servs., Inc., 854 F.2d
24 1179, 1181 (9th Cir. 1988).

25 In deciding whether to grant summary judgment, a court must
26 take three necessary steps: (1) it must determine whether a fact is
27 material; (2) it must determine whether there exists a genuine issue
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1 for the trier of fact, as determined by the documents submitted to
 2 the court; and (3) it must consider that evidence in light of the
 3 appropriate standard of proof. Anderson, 477 U.S. at 248. Summary
 4 judgment is not proper if material factual issues exist for trial.
 5 B.C. v. Plumas Unified Sch. Dist., 192 F.3d 1260, 1264 (9th Cir.
 6 1999). "As to materiality, only disputes over facts that might
 7 affect the outcome of the suit under the governing law will properly
 8 preclude the entry of summary judgment." Anderson, 477 U.S. at 248.
 9 Disputes over irrelevant or unnecessary facts should not be
 10 considered. Id. Where there is a complete failure of proof on an
 11 essential element of the nonmoving party's case, all other facts
 12 become immaterial, and the moving party is entitled to judgment as a
 13 matter of law. Celotex, 477 U.S. at 323. Summary judgment is not a
 14 disfavored procedural shortcut, but rather an integral part of the
 15 federal rules as a whole. Id.

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III. Discussion

18 Hajoca seeks partial summary judgment on its claims, alleging
 19 that there are no genuine issues of material fact with respect to
 20 its payment bond claim and unjust enrichment claim. In response,
 21 Amerind and Scarborough oppose Hajoca's motion for summary judgment,
 22 and seek summary judgment against Hajoca on the payment bond and
 23 unjust enrichment claims.

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A. Payment Bond

25 Suppliers for federal projects are protected by the Miller Act.
 26 40 U.S.C. § 3133. The Miller Act "requires a prime contractor of a
 27 federal project to furnish a payment bond to insure payments to

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1 individuals who supply labor and/or materials for federal projects.”
2 United States ex rel. Conveyor Rental & Sales Co. v. Aetna Cas. &
3 Surety Co., 981 F.2d 448, 450 (9th Cir. 1992). A payment bond
4 protects “those persons who have a contractual agreement with a
5 prime contractor or subcontractor engaged in a federal project.”
6 Id. The Miller Act “is entitled to a liberal construction and
7 application in order properly to effectuate the Congressional intent
8 to protect those whose labor and materials go into public projects.”
9 United States ex rel. Sherman v. Carter, 353 U.S. 210, 216 (U.S.
10 1957).

11 The Miller Act provides that “[b]efore any contract of more
12 than \$100,000 is awarded for the construction, alteration, or repair
13 of any public building or public work of the Federal Government, a
14 person must furnish to the Government [payment and performance]
15 bonds, which become binding when the contract is awarded”
16 40 U.S.C. § 3131(b). It further provides that “[a] person having a
17 direct contractual relationship with a subcontractor but no
18 contractual relationship, express or implied, with the contractor
19 furnishing the payment bond may bring a civil action on the payment
20 bond on giving written notice to the contractor within 90 days from
21 the date on which the person did or performed the last of the labor
22 or furnished or supplied the last of the material for which the
23 claim is made.” 40 U.S.C. § 3133(b) (2). The Miller Act requires
24 that the civil action “must state with substantial accuracy the
25 amount claimed and the name of the party to whom the material was
26 furnished or supplied or for whom the labor was done or performed.”
27 40 U.S.C. § 3133(b) (2).

1 In this case, Hajoca has satisfied the requirements for
2 bringing a civil action on the payment bond by providing timely
3 written notice to Amerind, and by stating the amount due and
4 providing documentation thereof. Defendants, however, have not
5 complied with the requirements of the Miller Act with regards to the
6 necessary payment bond.

7 The Bond was issued on its effective date of November 14, 2007.
8 The terms of the Bond read that the "Bond is not valid without
9 Certificate of Pledged Assets." (Payment Bond, P's Mot. for Summary
10 Judgment, Exhibit 3 (#25-1).) The Certificate of Pledged Assets
11 pledged certain assets, and referenced the Project, contract number,
12 and Principal (Amerind). The Certificate of Pledged Assets provided
13 that the pledge agreement shall be terminated "[u]pon completion of
14 the Project but not to exceed twelve (12) months" (Id.)
15 The Project was not completed within twelve months from the
16 effective date of the Bond, and is in fact still open and ongoing.
17 Amerind alleges that the United States Air Force is responsible for
18 the majority of the delays and disruptions experienced on the
19 Project. Neither Amerind nor the obligee of the bond, the United
20 States Air Force, procured an extension of the Bond beyond the
21 twelve-month period beginning on November 14, 2007. Therefore,
22 according to the terms of the Bond, the Bond and the Certificate of
23 Pledged Assets expired on November 14, 2008. Hajoca furnished
24 supplies to the Project in 2009, outside of the projected period
25 that the Bond purports to cover.

26 The Miller Act requires that a contractor furnish a payment
27 bond to the Government. Scarborough issued a year-long bond in
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1 exchange for a bond fee, and the bond was never extended, nor was
2 any additional payment made.

3 The District Court for the District of Columbia addressed a
4 similar issue. United States ex rel. Modern Electric, Inc. v. Ideal
5 Elec. Sec. Co., Inc., 868 F.Supp. 10, 14 (D.D.C. 1994). In Modern
6 Electric, the payment bond and the underlying contract both
7 indicated that the payment bond only covered the first year of the
8 public project, and that a new payment bond would be required if the
9 government extended the contract. Id. The Modern Electric court
10 held that the claim against the payment bond must be dismissed
11 because the payment bond expired after the first year, and
12 plaintiff's claims related to work performed after the first year.
13 Id. at 15. The court noted that the prime contractor or the
14 government may have breached obligations under the Miller Act by
15 failing to provide a bond in the subsequent years of the project,
16 but that was not a reason to "impose an obligation on [the surety]
17 that it did not undertake to bear and for which it apparently
18 collected no premiums." Id. at 14.

19 We agree with the Modern Electric court that regardless of any
20 fault on the part of Amerind or the government in this case to
21 extend the payment bond, we cannot hold Scarborough to an obligation
22 it did not undertake or receive compensation for. Therefore,
23 Hajoca's motion for summary judgment on its payment bond claim must
24 be denied, and Defendants' cross-motion as to the payment bond must
25 be granted.

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1 **B. Unjust Enrichment**

2 Hajoca also seeks summary judgment on its claim of unjust
 3 enrichment against Amerind. The doctrine of unjust enrichment or
 4 recovery in quasi contract applies in situations "where there is no
 5 legal contract but where the person sought to be charged is in
 6 possession of money or property which in good conscience and justice
 7 he should not retain but should deliver to another [or should pay
 8 for]." Leasepartners Corp. v. Robert L. Brooks Trust, 942 P.2d 182,
 9 187 (Nev. 1997). "The essential elements of quasi contract are a
 10 benefit conferred on the defendant by the plaintiff, appreciation by
 11 the defendant of such benefit, and acceptance and retention by the
 12 defendant of such benefit under circumstances such that it would be
 13 inequitable for him to retain the benefit without payment of the
 14 value thereof." Unionamerica Mortgage and Equity Trust v. McDonald,
 15 626 P.2d 1272, 1273 (Nev. 1981) (quoting Dass v. Epplen, 424 P.2d
 16 779, 780 (Colo. 1967)).

17 In this case, Amerind acknowledges that there is no express
 18 contract between Amerind and Hajoca, but contends that unjust
 19 enrichment does not apply because (1) there is a contract between
 20 Hajoca and Associated from which Hajoca should, according to
 21 Amerind, recover any damages, (2) Amerind is an incidental
 22 beneficiary of the contract between Hajoca and Associated, (3) the
 23 transaction here falls under the allegedly exclusive remedies of the
 24 Nevada Uniform Commercial Code, and (4) there are disputes as to the
 25 value of the materials provided and Amerind was not benefitted in
 26 any case.

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1 1. Contract Between Hajoca and Associated

2 We do not agree with Amerind that the contract between Hajoca
 3 and Associated bars Hajoca from bringing an unjust enrichment claim
 4 against Amerind, with whom it has no contractual relationship. In
 5 Leasepartners, plaintiff provided signs pursuant to a lease to
 6 defendant lessee, who leased property from defendant lessor for
 7 which the signs were used. 942 P.2d at 183-84. The Nevada Supreme
 8 Court held that the contract between plaintiff and the lessee did
 9 not prevent an unjust enrichment claim by plaintiff against the
 10 lessor.

11 Amerind's argument that it is an incidental beneficiary of the
 12 contract between Hajoca and Associated, and therefore cannot be sued
 13 on a theory of unjust enrichment, is also unpersuasive. In
 14 Leasepartners, plaintiff argued that it conferred a benefit on
 15 defendant lessor by providing newer, more attractive signs than the
 16 old signs previously displayed on the property. While the Nevada
 17 Supreme Court did not expressly consider any arguments relating to
 18 incidental beneficiaries, the holding in that case that the
 19 defendant lessor could be sued on a theory of unjust enrichment is
 20 nevertheless relevant and applicable to Amerind's argument. The
 21 defendant lessor is no less of an incidental beneficiary to the
 22 plaintiff and lessee's contract than Amerind was here.

23 Nor does Washington law, which does not control in this case,
 24 require a different result. Amerind cites Bort v. Parker for the
 25 contention that unjust enrichment cannot apply to a "mere incidental
 26 beneficiary of the transaction." 42 P.3d 980, 991 (Wash. Ct. App.
 27 2002) (citing Farwest Steel Corp. v. Mainline Medal Works, Inc., 741

1 P.2d 58, 64-65 (Wash. Ct. App. 1987). Farsteel is favorable to
 2 Amerind's position in holding that a supplier does not unjustly
 3 enrich a contractor from whom it is one step removed because the
 4 contractor "did not mislead [the supplier] in any fashion" despite
 5 being enriched by receiving but not paying fully for goods supplied
 6 by the supplier. Id. at 65. The reasoning in Farsteel does not,
 7 however, persuade us that Hajoca's unjust enrichment claim must be
 8 dismissed. The court in Farsteel was dealing with Washington
 9 State's mechanic's lien statutes, and not with the Miller Act. Id.
 10 at 63. The Farsteel court noted that "a materialman of a
 11 materialman of a contractor has too remote a relationship to fall
 12 within the [Washington] lien statutes." Id. Under the Miller Act,
 13 a supplier to a federal project is entitled to protection in the
 14 form of a payment bond that a prime contractor is required to
 15 provide. We conclude, for the purposes of this order, that Amerind
 16 may have breached its obligation under the Miller Act to provide
 17 that bond. In doing so, Amerind may have misled Hajoca, and may be
 18 liable for unjust enrichment. Nor is a breach of the Miller Act
 19 required for a finding of unjust enrichment. If Amerind retains
 20 materials supplied by Hajoca and is enriched thereby, without
 21 furnishing payment, either to Hajoca or Associated, Amerind may have
 22 been unjustly enriched by Hajoca.

23 2. Nevada's Uniform Commercial Code

24 Nor do we find Amerind's arguments that Article 2 of Nevada's
 25 Uniform Commercial Code ("UCC") provides the exclusive remedy in
 26 this case persuasive. Nevada's UCC provides that Article 2 "applies
 27 to transactions in goods." NEV. REV. STAT. § 104.2102. Amerind does

1 not provide any authority that an unjust enrichment claim by a
2 supplier to a contractor is barred by the Uniform Commercial Code,
3 nor have we found any such authority. Therefore, Amerind's argument
4 that Hajoca's claim of unjust enrichment must be dismissed on this
5 basis fails.

6 3. Dispute Over Value of Materials

7 Amerind claims that not all the materials provided by Hajoca
8 were used in the Project, and that the materials were not worth
9 \$14,866.29. Amerind has not provided any evidence, however, aside
10 from vague statements made in an affidavit that Hajoca has "failed
11 to provide evidence to Amerind that the items claimed for were
12 actually delivered to the Project." (Rashleger Decl. Ds' Opp. to
13 Mot. for Summary Judgment (#28).) Hajoca, on the other hand, has
14 provided detailed invoices and shipping notices.

15 We cannot, however, find that Hajoca is entitled to summary
16 judgment on its unjust enrichment claim. If we were considering a
17 breach of contract claim against Associated or the bond claim
18 against Scarborough, the invoiced amount may have appropriately been
19 awarded. In an unjust enrichment case, however, the measure of
20 damages is the benefit conferred upon Amerind, which may or may not
21 coincide with the invoiced amount. Nor has there been sufficient
22 evidence presented that the materials were used on the Project and
23 thereby benefitted Amerind. Therefore, we find that there is a
24 material dispute regarding the benefit conferred on Amerind and
25 summary judgment on the unjust enrichment claim shall be denied.

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IV. Conclusion

2 Hajoca's claim against the payment bond must be dismissed
3 because the payment bond expired twelve months after its effective
4 date, and before Hajoca provided Defendants with supplies for which
5 payment is being sought. Hajoca's unjust enrichment claim, however,
6 is not barred by the existence of a contract between Hajoca and
7 Associated, or the Uniform Commercial Code. Summary judgment in
8 favor of Hajoca on the unjust enrichment claim is not warranted
9 because there is a material dispute over the amount, if any, of the
10 benefit conferred on Amerind.

12 IT IS, THEREFORE, HEREBY ORDERED that Hajoca's motion for
13 summary judgment (#25) is **DENIED**.

15 **IT IS FURTHER ORDERED** that Amerind and Scarborough's cross-
16 motion for summary judgment (#29) is **GRANTED IN PART and DENIED IN**
17 **PART** on the following basis: **GRANTED** as to the payment bond claim,
18 and **DENIED** as to the unjust enrichment claim.

20 The action having been dismissed as to E. C. Scarborough with
21 respect to the payment bond claim, which is the only claim made by
22 Plaintiff against Scarborough, the action has been concluded as to
23 Defendant Scarborough.

25 DATED: February 7, 2011.

Edward C. Reed.
UNITED STATES DISTRICT JUDGE